

Exhibit 343

United States of America ex rel. Ven-A-Care of the Florida Keys, Inc., et al.
v. Dey, Inc., et al., Civil Action No. 05-11084-PBS

**Exhibit to the August 28, 2009 Declaration of Sarah L. Reid in Support
of Dey's Opposition to Plaintiffs' Motion for Partial Summary Judgment**

CAUSE NO. GV002327

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THE STATE OF TEXAS)IN THE DISTRICT COURT
 ex rel.)
 VEN-A-CARE OF THE)
 FLORIDA KEYS, INC.,)
 Plaintiffs,)
)
 VS.)TRAVIS COUNTY, TEXAS
)
 DEY, INC.; ROXANE)
 LABORATORIES, INC.; WARRICK)
 PHARMACEUTICALS CORPORATION;)
 SCHERING-PLOUGH CORPORATION;)
 SCHERING CORPORATION;)
 LIPHA, S.A.; MERCK-LIPHA, S.A.;)
 MERCK, KGAA; AND EMD)
 PHARMACEUTICALS, INC.,)
 Defendants.)53RD JUDICIAL DISTRICT

ORAL AND VIDEOTAPED DEPOSITION OF
 CHARLES A. RICE
 VOLUME III
 March 24th, 2003

ORAL AND VIDEOTAPED DEPOSITION OF
 CHARLES A. RICE, produced as a witness at the instance
 of the State of Texas and duly sworn, was taken in the
 above-styled and numbered cause on the 24th of March,
 2003, from 8:11 a.m. to 6:08 p.m., before
 Debra L. Sietsma, CSR in and for the State of Texas,
 reported by machine shorthand, at the offices of
 Fleckman & McGlynn, P.L.L.C., 515 Congress,
 Suite 1800, Austin, Texas, pursuant to the Texas Rules
 of Civil Procedure and the provisions as previously
 set forth.

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1 A. I did, because Euthyrox was essentially a --
 2 a brainchild of Merck, or at least Merck's strategic
 3 marketing group.
 4 Q. If you go to the next-to-the-last page,
 5 DL-TX-0090854, you'll see a list of pricing
 6 strategies. The first one, "Increase the spread to
 7 retail home care accounts by lowering acquisition cost
 8 more than AWP."
 9 Do you see that?

10 A. Yes, sir.

11 Q. And I assume that you were aware that that
 12 was Dey's pricing strategy back in 1992? Is that
 13 correct?

14 A. I obviously got a copy of this memo, yes.

15 Q. So you were aware that Dey's pricing strategy
 16 was to increase the spread by lowering acquisition
 17 cost more than AWP back in 1992?

18 A. I was aware that, in order for generics to
 19 have any uptake in the market, there had to be an
 20 increase in the spread compared to the brand that was
 21 currently on the market. Yes, I was aware of that.

22 Q. Would you please look at Exhibit 475.

23 A. Yes, sir, I have that.

24 Q. Purports to be an e-mail from you dated
 25 3-18-2002 to Mr. Mel Engle.

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1 Do you see that?

2 A. Yes, sir, I do.

3 Q. It's -- and I'm -- I'm going to read from it.

4 "It's absolutely imperative that we get every one of
 5 our sales and marketing employees to stop
 6 communicating in terms of AWP minus a percentage in
 7 the same sentence as reimbursement. This is
 8 discoverable even on e-mail history files, and we must
 9 get to a point that we are not even giving the
 10 impression that we promote our products with this" --
 11 this -- "In mind. This is very serious business as
 12 everything" -- we do -- "we are doing is under
 13 scrutiny."

14 Do you see that?

15 A. Yes.

16 Q. Did you send this e-mail to Mr. Engle?

17 A. Yes, sir, I did.

18 Q. And did Mr. Engle, to your knowledge, do
 19 anything in response to this e-mail?

20 A. I believe he did communicate throughout sales
 21 and marketing and throughout the company that we were
 22 not to communicate anything regarding of how a managed
 23 care entity reimbursed under its formulary.

24 Q. Why did you wait till March 18th, 2002 to
 25 order your subordinates to stop selling and marketing

1 your products in terms of the reimbursement spread off
 2 of AWP?

3 A. I think my e-mail is self-explaining, "stop
 4 communicating in terms of AWP minus a percent."

5 Q. Well, that was --

6 A. And I did this for the benefit of Mr. Engle,
 7 who was new to the company. Mr. Engle started with us
 8 in January of 2002, so I was getting him involved in
 9 this so he understood my position.

10 Q. Oh, this was just for Mr. Engle's purposes,
 11 then?

12 A. It was to get him involved, yes.

13 Q. It wasn't so he would get every one of your
 14 sales and marketing employees to stop communicating in
 15 terms of AWP minus a percentage?

16 A. It was, yes. But he is now in the loop as of
 17 this date, so I made sure he understood my position.

18 Q. So why did you wait till March 18th of 2002
 19 to tell any of your employees to stop the conduct
 20 referred to in Exhibit 475?

21 A. I don't think you can say I waited, sir.

22 This was precipitated by the attachment which, I
 23 believe, came to me around or on that date; and this
 24 is a specific reference to an agreement or
 25 negotiations with PCS.

1 Q. All right. So is it your testimony, then,
 2 that this was not the first time that you communicated
 3 to your subordinates that they should stop
 4 communicating in terms of AWP minus a percentage in
 5 the same sentence as reimbursement?

6 A. Not in those specific terms; but I've had
 7 discussions with staff, including Mr. Mozak, including
 8 sales and marketing management, regarding the issues
 9 surrounding how we market our products.

10 Q. All right. When was the first time that you
 11 told your employees to stop communicating in terms of
 12 AWP minus a percentage in the same sentence as
 13 reimbursement or words to that effect?

14 A. In words to that effect, this time; but prior
 15 to this time, I can't tell you what words I used.

16 Q. Well, when -- when did you ever try to
 17 communicate to any of your subordinates that they
 18 should stop marketing Dey's products based upon the
 19 reimbursement spread?

20 A. I was not aware that Dey's employees were
 21 marketing on the basis of reimbursement spread, sir.
 22 I can't answer that question. We've had discussions
 23 over the years regarding how we market our products.
 24 We've had presentations. We've had training. All of
 25 that applies, but I can't be specific to tell you when

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1 ten percent, the higher the AWP, the better the
 2 spread."
 3 Do you see that?
 4 A. Yes.
 5 Q. So do you know -- and you'll see
 6 Laura Sanchez here says, in Exhibit 570 in the middle,
 7 "I also advised CareMark to look very closely at
 8 AlPharma with their packaging. Contract manufacturing
 9 and the possibility that sometime they may have to
 10 adjust their AWP's if, in fact, they are deemed to be
 11 overly inflated, or if they are actively promoting
 12 their AWP, which is against FDA regulations."
 13 Do you see that?
 14 A. I see that. I don't have a clue what it
 15 means.
 16 Q. So do you know -- I mean as -- as -- as the
 17 former President and CEO of Dey Laboratories, do you
 18 think there was anything wrong with AlPharma actively
 19 promoting their AWP's?
 20 A. I think in -- if I understand and recall
 21 this, the way they were promoting it, the way they
 22 were setting their AWP, yes, I think that was creating
 23 an unlevel playing field.
 24 Q. How was it that they were setting the AWP's to
 25 create an unlevel playing field?

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1 A. They were setting them much, much higher than
 2 the current competitive environment, certainly higher
 3 than Dey's and Warrick's and other competitors'; so
 4 they are trying forcibly to win business on the basis
 5 solely of manipulating the spread.
 6 Q. What's wrong with that?
 7 A. We discussed that before. Manipulating the
 8 AWP upwards in order to create an artificial spread,
 9 I -- we agreed, coupled with promoting it to
 10 customers, which they're obviously doing here, is what
 11 I consider to be marketing the spread.
 12 Q. And you don't think there's anything wrong
 13 with setting an AWP from the outset that's higher than
 14 the prices that your drugs are actually being sold for
 15 by the wholesalers, do you?
 16 A. No. I think there's always some measure of
 17 difference between AWP and -- and the price that the
 18 products are being sold. It doesn't matter whether
 19 they're generics or brands. There -- there's a
 20 distribution channel that has to be satisfied with
 21 some measure of profitability.
 22 Q. So you think there's something wrong with a
 23 competitor coming in and setting their AWP higher than
 24 the AWP that's -- that are already in the marketplace
 25 for the generics, but you don't think there's anything

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1 wrong with Dey not adjusting their AWP's downward as
 2 the prices of the drugs fall in the marketplace?
 3 A. No. We adjusted our WACs downward, which is
 4 the issue here with the State of Texas, as I
 5 understand it. The AWP's, as we've testified, have
 6 rarely changed, if at all.
 7 Q. So how can -- how can there be something
 8 wrong with your competitors establishing an AWP higher
 9 than yours if there's nothing wrong with -- with your
 10 own company failing to adjust their AWP's downward as
 11 prices fall?
 12 A. When Dey first sets its AWP on a new generic
 13 coming to market, everybody in the system wins. We're
 14 saving money for, in this case, the states who use
 15 AWP, the states who use WACs, because we're lower than
 16 the branded competition. Our average selling price,
 17 or whatever we're charging to our customers, creates
 18 a -- a small additional spread for providers; so they
 19 win by switching to the generic, which, let's face it,
 20 if they convert from a brand, they have a cost.
 21 Changing from one product to another is costly. That
 22 has to be taken into consideration.
 23 In terms of coming to market late, in
 24 the case of AlPharma, with a -- what was -- I can't
 25 remember if it was third, fourth or fifth generic to

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1 the market -- and publishing an extraordinarily high
 2 AWP can only be for one reason, and that is to
 3 manipulate market share on the basis of the spread.
 4 I -- I find that objectionable, and I don't think they
 5 should have done it.
 6 Q. Okay. Now, you say that when -- when Dey
 7 came to market with a new drug and provided incentives
 8 to -- to providers to use Dey's new product by
 9 increasing the spread on Medicare and Medicaid
 10 reimbursement, that you believe Medicaid saved money
 11 because the AWP on the generic was lower than the
 12 brand, correct?
 13 A. The WAC was lower than the brand as well.
 14 Q. Okay. Let's talk about AWP right now.
 15 Isn't it a fact, sir, that -- that Dey
 16 would set the AWP at -- at ten percent less than the
 17 brand AWP when it would launch a product?
 18 A. Approximately, yes.
 19 Q. And then it would leave it there going
 20 forward, correct?
 21 A. That's my understanding, yes.
 22 Q. All right. So even though the actual prices
 23 in the marketplaces were falling as generic
 24 competition became healthy and brought the prices of
 25 the generics down, correct?

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1 A. Yes, sir.
 2 Q. So the -- the spread between the AWP and the
 3 actual prices in the marketplace got progressively
 4 greater because Dey did not lower its AWP?
 5 A. Because none of the competitors lowered their
 6 AWP, yes, sir.
 7 Q. I understand that. But Dey did not lower its
 8 AWP; and, therefore, the spread got greater and
 9 greater, correct?
 10 A. Yes, sir.
 11 Q. All right. So the incentive to the
 12 pharmacist or the provider that was being reimbursed
 13 based upon AWP got greater and greater as the prices
 14 came down and Dey did not lower its AWP, correct?
 15 A. And for all competitors, yes, sir, that's
 16 correct.
 17 Q. But -- but the incentive that Dey had
 18 arranged got greater and greater as the prices came
 19 down and Dey did not lower its AWP, correct?
 20 A. As is the case with all generics, yes, sir.
 21 Q. Correct for Dey also, correct?
 22 A. Correct for Dey, correct for every generic
 23 company out there. And, by the way, every branded
 24 company.
 25 Q. So if you'll go to -- back to Exhibit 459 --

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1 A. 459?
 2 Q. -- right -- which Mr. Winter will hand you --
 3 A. Yes, sir.
 4 Q. -- and you'll look at the next-to-the-last
 5 page again under "Pricing Strategies" where it says,
 6 the first strategy, "Increase the spread to retail
 7 home care accounts by lowering acquisition cost more
 8 than AWP."
 9 Do you see that?
 10 A. Yes, sir, I see it.
 11 Q. So that pricing strategy was intended to
 12 continue throughout the life of the product as the
 13 spread and, therefore, the incentive got greater and
 14 greater as the actual acquisition cost became
 15 progressively lower but the AWP stayed the same,
 16 correct?
 17 A. Let's say it was a part of the market
 18 dynamics for Dey's generic products, for all generic
 19 companies' generic products; however, we compensated
 20 for that by lowering the WAC periodically, as we've
 21 stated before.
 22 MR. WINTER: Objection, nonresponsive.
 23 Q. (BY MR. BREEN) When you testified earlier
 24 today that Exhibit 459 only involved the launch of a
 25 product, were you considering the fact that the

1 pricing strategy would exist throughout the life of
 2 the product because AWP would be kept at a static
 3 level and the spread off of AWP would get greater and
 4 greater as the prices fell?
 5 A. Your question is did I consider that fact?
 6 Q. Yes.
 7 A. Yes.
 8 Q. So Pricing Strategy No. 1 on Exhibit 459 in
 9 front of you, on the next-to-the-last page -- is it
 10 your testimony that that pricing strategy only applies
 11 at the launch and doesn't apply throughout the life of
 12 the product?
 13 A. No, sir. What I implied about the launch is:
 14 This is referring to increase the spread over the
 15 brand. At the launch there are no generic
 16 competitors. We're talking about one new generic
 17 entry coming to market versus the brand, which is
 18 higher priced based on where First DataBank and others
 19 tell us to set our AWP and our WAC. So what I'm
 20 talking about here is increase the spread relative to
 21 the brand. That is the generic incentive.
 22 Q. I understand.
 23 A. That's what I was referring to.
 24 Q. I understand that, but I'm -- I'm looking at
 25 Exhibit 459, next-to-the-last page, the first pricing

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1 strategy. It says, "Increase the spread to retail
 2 home care accounts by lowering acquisition cost more
 3 than AWP."
 4 Do you see that?
 5 A. Yes, sir.
 6 Q. All right. Isn't that the same pricing
 7 strategy that exists throughout the life of the
 8 product as AWP remains static and the spread becomes
 9 greater and greater as the price falls?
 10 A. It's a market dynamic. I wouldn't actually
 11 call it a pricing strategy. When there are more
 12 generic entrants to the market, the selling price does
 13 come down, yes, sir.
 14 Q. All right. Now, going back to Exhibits 469
 15 and 470 --
 16 A. 469?
 17 Q. -- 469 and 4 -- no, 569 and 570. I'm sorry.
 18 I misspoke.
 19 A. Yes, sir.
 20 Q. Did Dey Laboratories provide free goods to
 21 any of its customers in order to overcome the unfair
 22 disadvantage that it was placed in when a competitor
 23 inflated an AWP?
 24 A. Sir, I don't know; and I can't tell that from
 25 this document if that was, in fact, what was done or

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1 Q. And would this be the kind of document --
 2 kind of marketing plan that you would be made privy to
 3 as the Chief Executive Officer of Dey Laboratories?
 4 A. I would be copied on it, yes.
 5 Q. And would you -- would you typically go
 6 through something like this to make sure there was
 7 nothing in it that violated what you felt was company
 8 policy?
 9 A. Rarely.
 10 Q. Do you recall ever having seen this document
 11 before, this marketing plan?
 12 A. I'm pretty sure I saw it, yes.
 13 Q. Go to, if you would, Page 48 of the plan,
 14 which is DL-TX-0091054 --
 15 A. Uh-huh.
 16 Q. -- and you'll see Section 3, "Objectives."
 17 And the last one on that page is "To provide incentive
 18 to retail/chain providers to use Dey's Cromolyn by
 19 increasing the spread on Medicare/Medicaid
 20 reimbursements."
 21 Do you see that?
 22 A. Yes, sir, I do.
 23 Q. That was basically the same objective for the
 24 pricing strategy for the Albuterol launch, wasn't it?
 25 A. It's verbatim except for the word "Cromolyn."

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1 Q. Okay. Do you recall seeing that objective in
 2 the marketing plan at the time that the marketing plan
 3 was created?
 4 A. No, sir, I don't.
 5 Q. Go to the next page. You'll see the AWP
 6 reimbursement spread analysis at the bottom?
 7 A. Yes, I see that.
 8 Q. And, again, on the next page?
 9 A. Yes, I see that.
 10 (Exhibit 593 marked).
 11 Q. (BY MR. BREEN) Okay. Now, if you'd look at
 12 Exhibit 593, which you should also have in front of
 13 you, which -- prepared by Mr. Ellis, January 1, 1994,
 14 the "Abridged Marketing Plan."
 15 Do you see that?
 16 A. Yes, I do see that.
 17 Q. Again, would this be the kind of document
 18 that would be provided to you if it was going to be
 19 put into place by Dey's marketing department?
 20 A. Again, I would have been copied on it.
 21 Q. Go, if you would, to Page 43.
 22 A. I see that.
 23 Q. Same -- same objective, "To provide incentive
 24 to retail/chain providers to use Dey's Cromolyn by
 25 increasing the spread on Medicare/Medicaid

1 reimbursements."
 2 Do you see that?
 3 A. I see that.
 4 Q. And was the intent there to arrange a spread
 5 on Medicare/Medicaid reimbursement on Dey's generic
 6 Cromolyn that was -- that was a greater spread than
 7 what the pharmacy would enjoy if they bought the
 8 brand?
 9 A. I believe that was probably what Mr. Ellis
 10 intended, yes.
 11 Q. And that was the intention of -- of Dey in
 12 terms of its pricing strategy whenever it launched a
 13 generic drug, correct?
 14 A. That's correct.
 15 Q. Build in a bigger spread than the pharmacist
 16 or provider could make if it -- than if -- than if it
 17 bought the brand drug?
 18 A. That's correct.
 19 Q. Okay. If you go to Exhibit 465, please --
 20 A. Yes.
 21 Q. Again, it's a multipage document prepared
 22 by -- from Todd Galles, March 4th, 1996, Dey Albuterol
 23 Sulfate Inhalation Solution .5 percent, 20 milliliter.
 24 Do you see this?
 25 A. I see this.

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1 Q. This is the unit-dose Albuterol, correct?
 2 A. No, sir. This is multidose.
 3 Q. This is multidose. I'm sorry.
 4 A. Yes, sir.
 5 Q. Okay. Have you ever seen this document
 6 before?
 7 A. I don't think I did.
 8 Q. Well, if you look at the second paragraph,
 9 you'll see in the middle he says, "In addition, we
 10 included the multidose to unit-dose conversion reprint
 11 and worksheet and a retail profit gain worksheet. We
 12 used both successfully last year. Refamiliarize
 13 yourselves with these two pieces so that they can work
 14 to your advantage again. These pieces should
 15 reinforce the importance of our unit-dose business and
 16 also help you strategize where to pick up multidose
 17 business. Let us not forget that unit dose should
 18 remain our top priority," and that's underlined.
 19 Do you see that?
 20 A. Yes, sir, I see it.
 21 Q. And then if you'll go to the -- about halfway
 22 through the stack, and it's Bates-stamped
 23 DL-TX-0076254, you'll see a copy of the reimbursement
 24 comparison worksheet --
 25 A. Yes, sir. That's marked here.